

STATE OF NORTH DAKOTA  
OFFICE OF SECURITIES COMMISSIONER

IN THE MATTER OF:

Preferred Trust and Management,  
LTD, and Larry Borud,

Respondents.

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) **FINDINGS OF FACT, CONCLUSIONS**  
) **OF LAW AND ORDER**  
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On April 10, 2001, the Securities Commissioner issued a separate Cease and Desist Order, Notice of Civil Penalty, and Notice of Right to Request a Hearing to Larry Borud ("Borud"), along with a number of other individuals who had been involved in the sale of Preferred Trust and Management, LTD ("Preferred Trust"), securities in North Dakota. On May 27, 2003, the Securities Commissioner requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings ("OAH") to conduct a hearing and to issue recommended findings of fact and conclusions of law, and a recommended order in regard to this matter. Allen C. Hoberg, ALJ, was designated to preside as hearing officer for Borud's case.

This matter is one of many in regard to Preferred Trust and individually named respondents that began in 2001. Proceedings in all of these similar actions were stayed pending an appeal on one of the cases before the Commissioner to the District and Supreme Court. Henry, et al v. Commissioner, 2003 ND 62, 659 N.W.2d 869. On April 15, 2003, the Supreme Court issued its decision in Henry, dismissing the appeal because the Commissioner's July 31, 2001, Order was not a final order. Id.

On June 16, 2003, the ALJ issued a Notice of Hearing scheduling a July 30, 2003, hearing. At the request of the parties, the hearing was rescheduled for

September 18, 2003. The hearing was held as rescheduled. Special Assistant Attorney General Matthew O. Bahrenburg represented the Securities Commissioner. Borud appeared and represented himself.

The Securities Commissioner called as witnesses its investigator and examiner, Kelly Mathias and the respondent, Borud. Borud testified in his own behalf and called two other witnesses, Rick Lee Duncan and LeRoy Keith Carpenter. The Commissioner offered 23 exhibits. The respondent offered none. The Commissioner's proffered exhibits were admitted.

On September 26, 2003, the Commissioner filed a brief and closing argument. On October 15, 2003, the ALJ received Borud's post-hearing brief, in which Borud objected to any exhibits taken from a computer disc (CD Rom), which contained information taken from a computer disc, Exhibit D. The ALJ considered the request a motion to strike those exhibits. Exhibits E, G-Q, and R are documents taken from exhibit D. Exhibit F is Mathias' summary compiled from several of the exhibits taken from exhibit D. Exhibit V is Mathias' summary worksheet for Borud.

On November 6, 2003, the ALJ issued Recommended Findings and Recommended Order. Although the ALJ granted Borud's request to exclude a number of the exhibits offered on behalf of the Commissioner, the ALJ found the overall evidence presented sufficient to prove that Borud had violated the securities laws and recommended a civil penalty of \$10,000 be assessed against Borud.

As discussed below, the Commissioner adopts in part and rejects in part the ALJ's recommendations and, in lieu thereof, issues this final order in the matter of Borud.

### Admissibility of the Evidence

The ALJ originally admitted Exhibits D, E, G-Q, and R. These exhibits reflect documents seized from and found on the computer of Frederick Keiser, a commodities broker in Minot who acted as a principal for the Preferred Trust investment scheme in North Dakota. The ALJ also originally admitted the summaries prepared from those documents, Exhibits F and V. All of these documents were offered through Kelly Mathias, who was qualified as and declared an expert on high yield investment fraud and prime bank fraud. A trial deposition and trial transcripts from the trial of Fred Keiser for his actions in the Preferred Trust scheme were offered and received. The transcripts identified how the documents came to be in Mr. Mathias' possession. See Exhibits S, T, U. They, along with Mr. Mathias' testimony, show that Mr. Mathias was in attendance at the original search in which the computer was removed from Mr. Keiser's office, that the computer was taken into the possession of a Bureau of Criminal Investigation agent, that the computer was transferred to the Mid-States Organized Crime Information Center where true and accurate copies of the documents on the computer were retrieved onto a compact disc, and that the compact disc was returned to the North Dakota Bureau of Criminal Investigation and provided to the Securities Department. There was no evidence introduced that undermined the authenticity of the documents taken from Mr. Keiser's computer.

However, the ALJ "struck" the admission of those exhibits on the grounds that there was no testimony that identified the documents as business records of either the present respondent, Borud, or of the absent respondent, Preferred Trust. The ALJ indicated that no witness was familiar with the offered exhibits and none had specific

knowledge about the procedures under which the records were created. Finally, the ALJ claimed that there was no evidence about what these records mean in the business context, if anything, for Preferred Trust. In contradiction to these statements, the ALJ then identified that Mr. Mathias was able to testify about them as business records and could interpret them and could even make an apparently relevant summary about them.

The ALJ also identified that Mr. Mathis and the witnesses recognized the Keiser business records as part of the Preferred Trust investment scheme, a fraudulent investment scheme in which the respondent participated. Because the investment scheme was fraudulent, however, the ALJ claimed that these were not ordinary business records or subject to interpretation as common business records. The ALJ's explanation of this ground for rejecting the records is just not logical. Merely because a business is fraudulent does not mean that the records kept by the business are not accurate records of the transactions that were conducted in the course of operating the business.

Further, the ALJ, in the course of three separate proceedings involving similar respondents and Preferred Trust, treated the introduction and use of these records differently as to the different respondents. The Commissioner finds this unacceptable. In the hearing for Respondents Dennis Skarphol, Gerald Henry and Brian Henry, the ALJ admitted the same now-excluded exhibits, finding that the documents "showed that the three respondents were entitled to compensation from securities referrals, and monies were possibly earmarked for them."<sup>1</sup> In the consolidated hearing for five other

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<sup>1</sup> The ALJ did not believe this evidence showed that an actual offer or sale had been proven, a finding with which the Commissioner takes issue.

respondents, the ALJ refused to admit the documents and did not cite to them for support of his conclusion. In the separate hearing for Respondent Mark Dostert, the ALJ struck the same exhibits relating to information taken from Fred Keiser's computer, and then relied upon those excluded exhibits to support his findings that Dostert had violated the securities laws, just as he does in this case in supporting his recommendations concerning Borud. The Commissioner is unwilling to have the same evidence offered as to the various respondents treated in such an inconsistent manner. Under these similar circumstances, either they are admissible or they are not. The Commissioner finds they are admissible, as follows.

The Commissioner finds that the documents taken from Keiser's computer concerning the Preferred Trust accounts are admissible as to all respondents who were involved in the referral of potential purchasers to the Preferred Trust website and who, as a result of the referrals, were eligible to receive the equivalent of commissions for the subsequent sale of Preferred Trust shares, including Borud. Keiser acted as an agent for Preferred Trust and maintained records of those individuals in North Dakota who had made referrals to Preferred Trust, including Borud. Preferred Trust is a co-respondent with Borud. Borud referred one or more individuals to Keiser to invest in the Preferred Trust scheme. Mr. Mathias, who qualified as an expert on high yield investment fraud and prime bank fraud, was able to identify what the records meant and how they were kept in the ordinary course of Keiser's business on behalf of the fraudulent Preferred Trust investment scheme. The documents from Keiser's computer are equally relevant as to Preferred Trust and to the co-respondent Borud to the extent the referrals are verified by the respondent or other witnesses. Mr. Mathias laid sufficient foundation for

the introduction of these records and, although hearsay, they have substantial guarantees of trustworthiness through Mr. Mathias' explanations of their meaning and the confirmation of that meaning through the testimony of the witnesses.

Additional documents were admitted by the ALJ through Mr. Mathias' testimony that identified how the Preferred Trust scheme operated. These documents were printed from the Preferred Trust website. Mr. Mathias' testimony was accepted to prove that the Preferred Trust scheme was a prime bank fraud. Based on his understanding of the fraudulent scheme and the information on the website about the referrals and bonuses, Mr. Mathias was able to explain how each individual who "referred" someone else to the website or to Mr. Keiser would be paid for his referral. Finally, Mr. Mathias, based on his knowledge of the operation of the Preferred Trust scheme and his review of Mr. Keiser's documents, was able to tie Borud to an account number and to referrals Borud made to the Preferred Trust website or to Keiser. There was no evidence that disputed Mr. Mathias' expert testimony as to how the Preferred Trust scheme operated or how the bonuses were calculated for Borud's referrals to Preferred Trust.

For these reasons, the Commissioner reverses the ALJ's ruling that Exhibits D, E, G-Q, and R are not admissible in this hearing as to Borud. The summaries prepared by Mr. Mathias, Exhibits F and V, are similarly admissible.

Even without recourse to the information from Mr. Keiser's computer, however, the evidence and testimony of Borud shows that he knew that if he referred other individuals to Preferred Trust, either through the website or thorough Keiser, and the individual invested in Preferred Trust, Borud would receive a "bonus" based on the amount of the referred person's investment. Borud did, in fact, refer others and they did

invest in Preferred Trust. Because of those referrals, Borud was eligible to receive and did receive a bonus as a percentage of the amount invested by each referral. The amount of his bonus was reported on his statements. Borud had access to this bonus payment as web page information identified that this bonus was *"readily available for withdrawal from the Trust Account without any penalties."* Exh. A., Frequently Asked Questions, page 4 of 4 (emphasis added).

#### Findings of Fact

1. The Securities Commissioner investigated the activities of Frederick W. Keiser ("Keiser") of Minot and seized a computer from him. As a result of that investigation, separate Cease and Desist orders were issued against Preferred Trust and, amongst other individuals, Borud.

2. Exhibits A-C and other evidence identifies Preferred Trust as a fraudulent investment scheme. Mr. Mathias testified that Preferred Trust is a fraudulent investment scheme. There was no evidence offered to the contrary.

3. Borud knew about the Preferred Trust website and had knowledge about the fraudulent investment scheme, even if he did not actually know that it was a fraudulent scheme.

4. The respondent, Borud, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

5. The evidence from Keiser's computer shows that Borud is listed as having referred at least seventeen (17) other individuals to the scheme. Borud's own testimony shows that he referred at least nine other investors to Preferred Trust, each of whom invested in the scheme based on his referral. Borud communicated to these investors

that he was personally invested in the scheme. Borud stated that he referred the nine investors to the Preferred Trust website in order to complete their investment.

6. Borud discussed Preferred Trust with these individuals and made his referral of these individuals to Preferred Trust in North Dakota.

7. Borud stated that he knew he was entitled to receive compensation (a bonus) based on each of the referrals he made to Preferred Trust. Borud had knowledge that he would receive a bonus based on the amount of the investment made by an individual he referred to Preferred Trust.

8. Borud received bonus payments for referrals made to Preferred Trust, which bonuses were deposited in an account from which he could withdraw funds whenever he chose by using a debit card.

#### Conclusions of Law

1. The Preferred Trust investment scheme is a security as defined in N.D.C.C. § 10-04-02(15) (1999).

2. Preferred Trust is not registered or exempt from registration in North Dakota. See N.D.C.C. § 10-04-05 (1999), N.D.C.C. § 10-04-07 (1999), N.D.C.C. § 10-04-07.1 (1999), N.D.C.C. § 10-04-08 (1999), N.D.C.C. § 10-04-08.1.

3. The Preferred Trust securities were not offered for sale or sold in an exempt transaction. See N.D.C.C. § 10-04-06 (1999).

4. The Preferred Trust investment scheme is a fraudulent investment scheme.

5. An "offer for sale" or "offer to sell" includes an attempt to solicit an order for a security for value. N.D.C.C. § 10-04-02(9) (1999). This language has been



interpreted to and does include action that materially aids in a sales transaction of a security, including the solicitation of a buyer. See Pinter v. Dahl, 486 U.S. 622, 646-47 (1987). Other states have found such payments of finders fees, which would be equivalent to the referral bonuses paid in this case, to require registration as an agent by the person receiving the fee. See Blue Sky Law, Joseph C. Long, Vol. 12A, §8.33, © 2003. The federal Securities and Exchange Commission has stated that it would be a violation of the securities law for an individual who was not registered to make referrals to a broker and receive compensation for the referrals. See CCH ¶79,959 (1988).

6. Borud's referral of at least nine individuals to the Preferred Trust investment scheme with the knowledge that he would be entitled to compensation when those other people invested constituted an "attempt to offer to dispose of . . . a security or interest in a security for value," and therefore would be an "offer for sale" or "offer to sell." See N.D.C.C. § 10-04-02(9) (1999). When those people actually invested, the referrals became sales under N.D.C.C. § 10-04-02(13) (1999). Borud conceded that he referred at least nine of the 17 individuals that are listed as referred by him in the summary submitted by Mr. Mathias. Borud knew about the bonuses available for referrals. This is sufficient evidence to establish that Borud was a seller within the meaning of the language of N.D.C.C. § 10-04-02 (1999). As such, Borud violated the provisions of N.D.C.C. § 10-04-04 by offering a security for sale that was not registered in North Dakota.

7. The evidence shows that Borud violated the provisions of N.D.C.C. § 10-04-10 (1999) requiring that an individual offering for sale or selling any securities in North Dakota must be registered as a dealer or agent. Borud referred others to the

scheme with the knowledge that he would be entitled to compensation if they invested. Those referrals constituted "an attempt to offer to dispose of . . . a security or interest in a security for value" and is, therefore, an "offer for sale" or "offer to sell" as defined in N.D.C.C. § 10-04-02(9) (1999). When Borud referred others to Keiser or the Preferred Trust web page for investment in the Preferred Trust scheme, he was offering to sell and selling to investors in North Dakota and was acting as an unregistered agent of the unregistered securities dealer Preferred Trust (through Fred Keiser). Thus, Borud was in violation of N.D.C.C. § 10-04-10 (1999).

8. Borud violated the provisions of N.D.C.C. § 10-04-15(2) and (4) by offering for sale investments in a fraudulent investment scheme. Any person who solicits investors to invest in a fraudulent program is engaging in a course of business that operates as a fraud or deception upon investors. There is no intent required under N.D.C.C. § 10-04-15(2) or (4). Preferred Trust is a fraudulent investment scheme. Borud violated the provisions of N.D.C.C. § 10-04-15(2).

9. Under N.D.C.C. § 10-04-16 (1999), a \$10,000 civil penalty may be imposed for each violation of N.D.C.C. ch. 10-04.

10. As to Borud, the evidence shows at minimum nine violations of N.D.C.C. § 10-04-04 (one violation for each investor Borud remembers having referred to the Preferred Trust scheme). The evidence shows at minimum nine violations of N.D.C.C. § 10-04-10 (one violation for each investor Borud remembers having referred to the Preferred Trust scheme). The evidence shows nine violations of N.D.C.C. § 10-04-15 (one violation of the prohibition against fraudulent practices for each of the nine frauds in which Borud was engaged that were perpetrated upon those nine investors).

Therefore, the Commissioner has authority to impose a civil penalty against Borud in the amount of at least \$270,000.

Order

The greater weight of the evidence shows that Borud violated the provisions of N.D.C.C. §§ 10-04-04, 10-04-10 (1999), and 10-04-15 and, therefore, it is ordered that the Cease and Desist Order issued against him on April 10, 2001, remain in effect, indefinitely, unless otherwise lifted or dismissed by the Securities Commissioner. Further, although a civil penalty may be imposed in the amount of \$270,000 against Borud, the evidence shows that Borud was, as many of the individuals who participated in the furtherance of the Preferred Trust scheme, a victim as well as a perpetrator. It would be unfair to impose a very large civil penalty against any of them.

Therefore, it is ordered that a civil penalty is imposed against Borud in the amount of \$5,000.

Dated at Bismarck, North Dakota, this 9<sup>th</sup> day of March, 2004.



NORTH DAKOTA SECURITIES DEPARTMENT

  
Karen Tyler  
Securities Commissioner